No. 09-50401

In the United States Court of Appeals for the Fifth Circuit

CHRISTINA CASTILLO COMER,
Plaintiff-Appellant,

v.

ROBERT SCOTT, COMMISSIONER, TEXAS EDUCATION AGENCY, IN HIS OFFICIAL CAPACITY; TEXAS EDUCATION AGENCY,
Defendants-Appellees.

On Appeal from the United States District Court
Western District of Texas, Austin Division

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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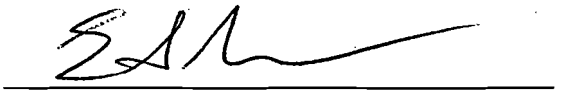

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff challenges an employment policy that simply requires Texas Education Agency employees to remain neutral and express no opinion on behalf of the TEA on *any* matter of curriculum policy subject to the discretion of the Texas Board of Education. Nothing in the TEA policy remotely takes a position on the debate between evolution versus creationism, or contemplates the teaching of any particular curriculum in public schools. To the contrary, although in this case Plaintiff violated the policy by circulating an email voicing a strong opinion against creationism, she would have violated the policy had she distributed an email *supporting* creationism.

Accordingly, the district court properly applied established law to conclude that the neutrality policy does not have the "primary effect" of advancing or endorsing religion and therefore does not violate the Establishment Clause.

Defendants respectfully submit that, given the straightforward nature of the issues in this case, oral argument would not significantly aid the Court in its review of the judgment below. But if the Court determines that oral argument would be useful to its resolution of this case, Defendants would like to participate.

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BRIEF OF APPELLEES

In an attempt to dramatize the story of her termination, Plaintiff has invoked the emotionally charged debate over the teaching of evolution versus creationism in public school science classes. But the true story is much simpler—and far more mundane. In fact, little distinguishes this dispute from a garden variety case of employee insubordination. There is nothing remarkable about asking an employee to leave after repeated acts of misconduct—including her public airing of personal views on evolution versus creationism, in violation of her employer's neutrality requirement.

Plaintiff is a former employee of the Texas Education Agency. TEA is charged with implementing and administering the policy decisions of the Texas Board of Education, an elected body responsible for setting the statewide education curriculum.

To protect the integrity of the Board's decisionmaking process, TEA has a long-established unwritten policy, under which its employees must remain neutral and express no opinion on *any* curricular matter subject to the Board's jurisdiction. Plaintiff does not dispute that she violated this policy when she used her state computer to circulate an email to various groups voicing a strong view on the issue of teaching creationism as science.

For her part, Plaintiff repeatedly insists she was let go based on an unconstitutional "creationism policy"—one that "equates creationism with science." But no such policy exists, notwithstanding her efforts to cobble one together. To the contrary, although the email she circulated happened to oppose creationism, she would have violated the TEA neutrality policy just as readily had she circulated emails *supporting* creationism. Accordingly, her termination for repeated insubordination, culminating in the email incident, presents no significant constitutional questions.

To be sure, constitutional issues might be presented when Board members make certain sensitive decisions about the education curriculum—or when Agency employees are asked to implement and administer the Board's decisions. But that is

distinct from policies that protect the decisional process itself. Nothing in the TEA neutrality policy remotely suggested the teaching of creationism as science—or contemplated that TEA employees would advise teachers to do so. Indeed, as it turns out, the Board ultimately decided to continue its preexisting policy requiring the teaching of evolutionary theory, without creationism. More importantly, nothing in the TEA policy asks employees to do anything unlawful or unconstitutional, or indeed to undertake any affirmative act of any kind. It only requires that Agency employees respect—and not undermine—the decisional process.

Consider the following analogy: A law clerk may learn that his or her judge is pondering an interpretation of the Establishment Clause with which the clerk personally disagrees. But that discovery would not license the clerk to use a court computer to publish a blog or op-ed attacking that view—or prevent a judge from disciplining that clerk for doing so—no matter how strongly the clerk felt it was a misconstruction of the Constitution.

So too here. TEA may forbid employees from undermining the decisional process by publicly voicing positions on matters that could be before the Board.

Accordingly, the district court was right to grant summary judgment to Defendants—and to reject Plaintiff's contention that her termination for insubordination violated the Establishment Clause.

ISSUE PRESENTED

May the Texas Education Agency require its employees to remain neutral and refrain from advocating positions on curriculum issues that are within the discretion of the Texas Board of Education, in order to protect the integrity of the Board's decisionmaking process? Does that policy violate the Establishment Clause when it is invoked to forbid TEA employees from publicly taking any position, one way or another, on the specific issue of teaching creationism as science?

STATEMENT OF THE CASE

Plaintiff Christina Castillo Comer is the former Director of Science for the Curriculum Division of the Texas Education Agency. R.255 (Plaintiff's Summ. J. Fact ¶ 6).[1] TEA is a state agency that provides administrative support to the Texas Board of Education, an elected body responsible for setting the statewide curriculum. R.205 (Affidavit of Dr. Sharon L. Jackson, TEA Associate Commissioner for Standards and Programs). Defendant Robert Scott is the Commissioner of Education and head of TEA. R.253 (Plaintiff's Summ. J. Fact ¶¶ 1, 2). (Although Comer abandoned all claims against TEA itself, R.231, this brief will refer to Scott as "TEA" or the "Agency," consistent with Plaintiff's briefing on appeal, Appellant's Br. 2 n. 2.)

This case arose out of TEA's decision to terminate Comer's employment in response to repeated instances of insubordination and misconduct, including Comer's undisputed violation of the Agency's neutrality policy.

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1 Citations to "R._" refer to particular pages of the district clerk's record.

On October 26, 2007, Comer received an email from Glenn Branch, addressed to her TEA account, advising about an upcoming speaking event in Austin entitled "Inside Creationism's Trojan Horse," in which the featured guest would give a presentation critical of teaching creationism in public schools. R.17-18 (Compl. ¶ 29); R.52 (Compl., Ex. H). Comer responded to the email by promising to "help get the word out," and she did so that same day by forwarding the message from her TEA email account to 36 science teachers in the Austin area and heads of science teacher organizations. R.18-19 (Compl. ¶¶ 30-32); R.52-53, 55-56 (Compl., Exs. H-I).

Comer's direct supervisor, Monica Martinez, determined that forwarding the Branch email violated not only TEA policy, but also a directive issued to Comer based on her past misconduct. The directive prohibited Comer from communicating with anyone outside TEA in any way that could imply endorsement of a position on any curriculum issue that may be considered by the Board. R.212 (Martinez Aff.).

On November 7, 2007, Comer was provided with a memorandum recommending termination of her employment based on several instances of insubordination and misconduct, including her forwarding of the email in question. *Id.* at 212-13; R.215 (Shindell Aff.); R.30-33 (Compl., Ex. B). The next day, Comer resigned. R.216 (Shindell Aff.); R.70 (Compl., Ex. O).

On June 30, 2008, Comer filed a complaint for declaratory and injunctive relief in the U.S. District Court for the Western District of Texas, asserting two claims under the Establishment Clause as well as a Due Process claim. R.23-25 (Compl. ¶¶ 53-62). Both sides filed motions for summary judgment on Comer's claims.

The district court heard oral argument on the motions on December 17, 2008 and issued its order and judgment dismissing all of Comer's claims on March 31, 2009. *See* Appellant's Record Excerpts ("RE.") 2-3. The court found that "Comer provide[d] no summary-judgment proof raising an issue of material fact regarding whether [TEA's] neutrality policy has a primary effect of advancing or endorsing religion." RE.2 at 18.

Because Comer failed to produce evidence sufficient to demonstrate that the policy violated the Establishment Clause, the court granted summary judgment dismissing all of Comer's claims. *Id.* Comer appealed.

STATEMENT OF FACTS

I. THE TEXAS BOARD OF EDUCATION IS RESPONSIBLE FOR ESTABLISHING STATE CURRICULUM REQUIREMENTS, WITH ADMINISTRATIVE SUPPORT FROM THE TEXAS EDUCATION AGENCY.

The Texas Board of Education and the Texas Education Agency are independent state actors, with distinct but overlapping responsibilities for administering public education in Texas.

The Texas Board of Education is established by the Texas Constitution. TEX. CONST. art. VII, § 8. Its members are elected from fifteen districts throughout Texas. TEX. EDUC. CODE § 7.101. The Board is statutorily tasked with "establish[ing] curriculum and graduation requirements" and determining which textbooks shall be purchased by the state for school use. *Id.* at §§ 7.102(c)(4), 31.022, 31.023.

The Board considers curriculum proposals and recommendations from teachers and other experts as part of this process. R.205 (Jackson Aff.). But ultimate responsibility for determining the substantive curriculum and adopting rules to carry out the curriculum lies exclusively with the Board. *Id.*; TEX. EDUC. CODE § 7.102(c)(11).

The Board also determines the "essential knowledge and skills" ("TEKS") that every Texas child must demonstrate in various subject areas in order to graduate. TEX. EDUC. CODE §§ 28.001-.002; R.205 (Jackson Aff.). The Board develops the TEKS "with the direct participation of educators, parents, business and industry representatives, and employers." *Id.* at § 28.002(c). TEA staff are not direct participants in the TEKS development process.

TEA is led by the Commissioner of Education, who is appointed by the Governor subject to Senate confirmation. TEX. EDUC. CODE §§ 7.051, .055. Because the Board has no staff of its own, the Commissioner provides TEA staff to assist the

Board with the administrative, procedural, and clerical tasks necessary to develop the curriculum and TEKS. *Id.* at §§ 7.055(b)(2)-(3), (5), .102(b). TEA's role during the curriculum development process is "to facilitate the curriculum review meetings," "provide resources for the board's advisors[,]" and to "accurately draft and neutrally compile [both] the committee's recommendations [to the Board] and [the] Board's resulting decisions." R.205 (Jackson Aff.). TEA staff do not advocate for specific outcomes but only "provide administrative support for the board and its process." *Id.*

II. COMER UNDERSTOOD THE BOARD'S SUBSTANTIVE ROLE—AND TEA'S SUBORDINATE ROLE—IN THE ESTABLISHMENT OF THE STATE CURRICULUM.

The Board, and not TEA, is responsible for determining the substantive components of the state science curriculum. As Director of Science for the Curriculum Division of TEA, Comer was charged with providing "non-regulatory guidance" concerning the state curriculum and "support and guidance" regarding TEKS compliance. R.298, 300 (Martinez Aff., first attachment). In other words, she was responsible for administering *existing* TEKS, including "providing information and answering questions"; she had no role in determining the substantive components to be included in the curriculum or in making TEKS proposals. R.205 (Jackson Aff.) (emphasis supplied).

Comer was aware of the allocation of authority and responsibility for curriculum matters between TEA and the Board long before this dispute arose. After a July 2005 curriculum division staff meeting, Comer was provided with information about the two entities in a document entitled "TEA and Statutory Authority—a Refresher." R.299 (Martinez Aff.). That document explained that "TEA's statutory authority is laid out in TEC [Texas Education Code] Chapter 7. . . . Section 7.003, Limitation on Authority, essentially says that if TEC doesn't specifically grant authority for a particular action to TEA, then we don't have it." R.302 (Martinez Aff., second attachment). The Refresher then explicitly stated that "Section 28.002c gives the SBOE authority to designate the essential knowledge and skills for each subject of the required curriculum"—meaning that TEA "does not have [this] authority." *Id.*

III. UNDER WELL ESTABLISHED TEA POLICY, STAFF MUST REMAIN NEUTRAL AND EXPRESS NO OPINION ON CURRICULUM ISSUES SUBJECT TO THE AUTHORITY OF THE BOARD.

To ensure that the Board enjoys an orderly decisionmaking process, TEA staff are "directed not to advocate a particular position on [curriculum] issues under deliberation, or participate in any way that could compromise the agency's ability to fairly and accurately implement the policy choices made by the Board." R.205 (Jackson Aff.). Put simply, TEA staff can describe the contents of Board policy to

others in neutral terms, if their jobs call for it, but they may not express opinions on the wisdom of any particular policy option in their capacity as TEA employees.

Neutrality is "essential" to preserving TEA's administrative role in facilitating the curriculum review process for the Board and carrying out the Board's decisions. R.205 (Jackson Aff.). The integrity of the TEKS review process depends upon TEA staff avoiding even the appearance of partiality on the issues. R.30 (Compl., Ex. B); R.210 (Martinez Aff).

Accordingly, Ms. Martinez, Comer's direct supervisor, reminded TEA staff on multiple occasions to be careful not to advocate for or against particular positions pertaining to curriculum issues "being considered or . . . expected to be considered" by the Board as part of the TEKS review process. R.210 (Martinez Aff.). Likewise, Dr. Jackson noted that Standards and Programs leadership regularly reminded all TEA staff, including Comer, that TEA's role during the curriculum development process is to support the Board in carrying out its duties, and specifically, to "remain neutral" on any curriculum issue "that is or will be under review" by the Board. R.205 (Jackson Aff.).

TEA has enforced its neutrality policy across a wide range of curriculum issues subject to decision by the Board. As Ms. Martinez explained:

> For example, one such occasion related to adoption of new rules for graduation requirements that included additional credits of math and science. There were issues such as whether or not the course Integrated Physics and Chemistry should continue to count as science credit. The SBOE was split on this issue and I reminded staff that we could not advocate for one side or the other.

R.210-11 (Martinez Aff.). Ms. Martinez also regularly reviewed PowerPoint slides that TEA staff used for presentations, often correcting statements "that gave guidance or opinions [that the Agency was] not authorized to give." *Id.*

IV. COMER HAD A HISTORY OF INSUBORDINATION AND POOR JUDGMENT WHILE WORKING AT THE AGENCY.

Plaintiff's opening brief portrays Comer as a "life-long, multi-award-winning science educator," and suggests that her sole "purported offense" was the circulation of the Branch email concerning creationism. Appellant's Br. 7. This portrayal is, at best, incomplete. As the record illustrates, Comer engaged in numerous acts of insubordination and poor judgment, reflecting a personal agenda and an unwillingness to neutrally implement and administer the policy decisions of the Board.

On numerous occasions, TEA executives reminded Comer and other staff that they serve the Board as a whole, and thus must not appear to be serving the interests of individual members. R.210 (Martinez Aff.). But Comer disregarded those instructions. *Id.* For example, at a November 2006 Board meeting, the Commissioner and others expressed concern that Comer was providing information to one particular

Board member, at the expense of others, in order to help that member build an argument for a particular set of rules regarding high school science courses. *Id.*

Comer also made inappropriate official communications to non-TEA personnel. On the last day of the November 2006 Board meeting, Ms. Martinez asked Comer not to communicate with anyone outside TEA regarding the Board's science curriculum deliberations, in order to ensure that TEA was not releasing premature or inaccurate information. *Id.* Just a few hours later, Comer did precisely that. She forwarded an email to a group of science educators disclosing the very information Ms. Martinez asked her not to disclose. *Id.*

In addition, Comer attended various meetings and presentations without prior Agency approval, in violation of TEA policy. *Id.* at 211. TEA staff had been advised on numerous occasions that, due to funding constraints, they could not travel to regional meetings, for fear of appearing to give preferential treatment to certain areas of the state. *Id.* Comer violated this requirement several times, and even misled the Agency as to her whereabouts. *Id.* at 211-12. On one occasion, Comer called in to inform her supervisors that she had to be with her father at the hospital. *Id.* The division director later found evidence on a fax machine in the office that a school district was going to pay Comer for a presentation to be given on that same day. *Id.* On another occasion, Comer gave an oral report at a Texas Science Educational

Leadership Association meeting without prior approval. R.32 (Compl., Ex. B). When Comer later asked for approval to post PowerPoint slides of her presentation on the Association's website—after she had already given the presentation in violation of TEA policy—Ms. Martinez learned that her speech included information about the science TEKS review process that had not yet been confirmed by the Board, and was therefore inappropriate to share. *Id.*

In response to these acts of misconduct, Ms. Martinez issued a "Letter of Counseling" to Comer in February 2007, a step in the TEA disciplinary process. R.212 (Martinez Aff.). The letter provided Comer with a list of directives to follow, including a requirement that she must not "communicate in writing or otherwise with anyone outside the agency in any way that might compromise the transparency and/or integrity of the upcoming TEKS development and revision process." *Id.*

V. COMER'S CIRCULATION OF THE CREATIONISM EMAIL WAS THE FINAL STRAW—RESULTING IN THE REQUEST FOR HER RESIGNATION.

On October 26, 2007, Comer received the Branch email, addressed to her TEA account, advising about a presentation to be given in Austin that would be critical of teaching creationism in public schools. R.17-18 (Compl. ¶ 29); R.52 (Compl., Ex. H). Comer responded that she would "help get the word out," and then forwarded the Branch email from her TEA email account to 36 science teachers in the Austin area

and heads of science teacher organizations that same day. R.18-19 (Compl. ¶¶30-32); R.52-53, 55-56 (Compl., Exs. H-I).

Ms. Martinez concluded that forwarding the Branch email violated TEA policy as well as the February 2007 directive. R.212 (Martinez Aff.). Accordingly, Martinez prepared a "Proposed Disciplinary Action" memorandum (dated November 5, 2007) for the Associate Commissioner for Standards and Programs, summarizing Comer's prior misconduct and recommending that she be terminated from her position at TEA. *Id.*; R.30-33 (Compl., Ex. B). With regard to the Branch email, the memo stated that Comer "compromise[d] the agency's role in the TEKS revision process by creating the perception that TEA has a biased position on a subject directly related to the science education TEKS." R.31.

On November 7, 2007, Ms. Martinez and Dr. Thomas Shindell, who oversees the TEA Human Resources Division, met with Comer. R.212 (Martinez Aff.); R.215 (Shindell Aff.). In that meeting, Dr. Shindell showed Comer the memorandum that Ms. Martinez had written and that the Associate Commissioner had approved, explaining that it recommended termination of her employment, but provided her with the opportunity to resign. R.215-16 (Shindell Aff.). Dr. Shindell gave Comer administrative leave for the remainder of the day, and asked her to inform him of her

decision concerning resignation by noon the following day. *Id.* The next day, Comer resigned. *Id.* at 216; R.70 (Compl., Ex. O).

VI. THE BOARD OF EDUCATION SUBSEQUENTLY MAINTAINED THE TEACHING OF EVOLUTION—AND NEVER CONSIDERED INCLUDING CREATIONISM.

Throughout the events giving rise to this action, the statewide science curriculum required students to learn the theory of evolution, and the Board never considered whether to amend the Texas curriculum to include the teaching of creationism as science. *See* R.17 (Compl. ¶ 27); R.169 (Answer ¶ 27).

During the summer of 2008, the Board was expected to determine the science curriculum for the following decade. Among other things, the Board would decide whether preexisting language regarding the "strengths and weaknesses" of evolution theory should be kept or removed from the existing science TEKS. *See* R.17 (Compl. ¶ 28); R.47-50 (Compl., Ex. G); *see also* R.212 (Martinez Aff.) (TEKS regarding evolutionary theory "expected to be debated" during TEKS revision process).

The Board ultimately adopted new TEKS for the study of evolutionary theory that maintained the requirement that evolution be taught, while removing the "strengths and weaknesses" language from the prior science TEKS, starting with the 2010-11 school year. 19 TEX. ADMIN. CODE § 112.34(c)(7) (2009). As Comer herself has acknowledged, "[t]here is no evidence in the summary judgment record . . . that the

TEKS review process actually included, or was intended to include, consideration of teaching creationism in public education" in Texas. R.538 (Plaintiff's Reply Br. in Supp. of Mot. for Leave at 2).

SUMMARY OF ARGUMENT

Comer's entire complaint is founded on her repeated assertion that TEA policy advances religion by "equating" the teaching of creationism with the teaching of evolution and science. But TEA does no such thing. Its policy simply requires TEA employees to refrain from expressing opinions on curriculum issues subject to the authority of the Board. Comer violated that policy by circulating an email hostile to creationism, but she would have violated that same policy had she circulated an email supportive of creationism. Common sense confirms what the district court held—that TEA's policy of neutrality on all curriculum matters subject to Board authority did not have the "primary effect" of endorsing religion. Accordingly, the judgment below should be affirmed.

ARGUMENT

I. COMER'S ESTABLISHMENT CLAUSE CLAIM IS MERITLESS.

Comer does not dispute that, in order to prevail on any of her claims, she must first prove that the TEA policy violates the Establishment Clause—a hurdle she cannot meet. To begin with, her Establishment Clause challenge was plainly ripe for summary

judgment; indeed, Comer herself argued below that there was no material dispute of fact regarding the validity of the TEA policy. And her Establishment Clause challenge plainly fails on the merits, because the TEA policy does nothing more than require its employees to remain neutral in order to protect the Board's decisional process.

A. The TEA Neutrality Policy is Neutral in Both Its Purpose and Effect.

The "touchstone" of any Establishment Clause analysis is governmental "neutrality" with respect to religion. *Croft v. Perry*, 562 F.3d 735, 742 (5th Cir. 2009). It is only when "the government acts with the ostensible and predominant purpose of advancing religion that it violates the central Establishment Clause value of official religious neutrality." *Id.* (quoting *McCreary County v. ALCU*, 545 U.S. 844, 860 (2005)). The Supreme Court has held that this "guarantee of neutrality is respected, not offended, when the government, following *neutral criteria and evenhanded policies*, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (citation omitted) (emphasis supplied).

TEA's challenged policy easily satisfies the mandate of "religious neutrality" demanded by the Establishment Clause. The policy requires only that TEA staff refrain from publicly expressing opinions concerning substantive curriculum issues that are required to be determined by the Board. *See supra* pp. 9-11. The entire purpose of the

policy is to ensure TEA's neutrality on curriculum issues, so that the Agency can carry out its administrative duties without the appearance of partiality, allowing policymakers to resolve substantive curriculum disputes. *Id.* Neither religion nor religious practices are implicated by this evenhanded policy in any way.

It is particularly difficult to see how the TEA policy could advance religion, when it applies to all curriculum issues within the Board's jurisdiction. TEA employees were regularly advised that they must not express opinions on *any* issue under the Board's authority. *See supra* pp. 9-11. Indeed, as Comer acknowledged, the "Proposed Disciplinary Action" memo against her was the "only" example of the policy ever being applied to the "evolution vs. creationism" debate. *See* Appellant's Br. 9, 30. That memorandum itself described the global nature of the policy, noting that TEA employees must not "provid[e] guidance or opinions about [] *any other matters about which we have no statutory authority.*" R.30 (Compl., Ex. B) (emphasis supplied). Ms. Martinez likewise provided various examples of the "global" application of the policy, outside of the "evolution vs. creationism" debate. *See supra* pp. 10-11.

Comer responds by pointing out that "creationism" was not a specific and explicit agenda item for the Board at the time she forwarded the Branch email—essentially insinuating that the enforcement of the TEA neutrality policy

against her must have been a sham. *See* Appellant's Br. 9, 30. This argument is mistaken on several levels.

First, Comer misunderstands the scope of the policy. TEA's neutrality requirement is directed generally at the Board's authority to decide substantive curriculum issues—whatever they may be, and whenever they may be considered. The requirement is not directed at any particular issue that might be pending before the Board at any given moment. Simply put, the policy concerns process, not substance; it removes TEA personnel from the realm of policymaking, leaving that role solely with the Board, where it is must be.

Moreover, Comer's own complaint and supporting documents confirm that, at the time she forwarded the Branch email, the Board was indeed expected to undertake a review of the entire science curriculum—including language in the TEKS pertaining to the "strengths and weaknesses" of evolutionary theory. *See supra* pp. 15-16.

Given its neutral purpose and effect, it is difficult to see how the TEA policy presented even an incidental benefit to religion—after all, another TEA employee could have just as easily violated the policy, and been subject to adverse employment action, by *supporting* the teaching of creationism as science. And in any event, the Establishment Clause does not forbid merely incidental benefits to religion. *See, e.g.*,

Good News Club, 533 U.S. at 113-14 (permitting religious club to meet on elementary school premises would not violate Establishment Clause, where forum was open to other organizations); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (allowing religious club use of school to show films did not violate Establishment Clause, where meetings were held outside of school hours and open to the public); *Widmar v. Vincent*, 454 U.S. 263, 272-74 (1981) (university's allowance of religious group, among other student organizations, to use public facilities would provide only "incidental" benefit to religion, thus satisfying Establishment Clause).

B. This Case Triggers None Of The Concerns Presented In *Aguillard*—Plaintiff Is Challenging A Neutral Employment Policy, Not A School Curriculum.

Comer relies almost exclusively upon *Edwards v. Aguillard*, 482 U.S. 578 (1987) and its progeny in her challenge to the constitutionality of TEA's policy.

But all of these cases involve legislative mandates requiring the teaching of creationism-as-science (or undermining the teaching of evolutionary theory) in public school science curricula. *See Aguillard*, 482 U.S. at 591-93 (invalidating statute that forbade the teaching of evolution unless it was accompanied by the teaching of "creation science"); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 346-48 (5th Cir. 1999) (striking down board resolution requiring disclaimer to be read in class stating that the teaching of evolution was "not intended to influence or dissuade the

Biblical version of Creation"); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp. 2d 707, 708-09 (M.D. Pa. 2005) (rejecting board resolution mandating that "[s]tudents will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design"); *Selman v. Cobb County Sch. Dist.*, 390 F.Supp. 2d 1286, 1292, 1312 (N.D. Ga. 2005) (rejecting board resolution that required placement of a sticker on science textbooks proclaiming that "[e]volution is a theory, not a fact"), *vacated and remanded for additional evidentiary proceedings*, 449 F.3d 1320 (11th Cir. 2006).

None of these cases involve an internal employment policy, as here, requiring only silence and restraint by Agency staff so that the Board can make its own curriculum decisions—whatever they may be. There is no evidence remotely suggesting that this policy is a sham or in fact motivated by religious purposes. And Comer does not claim that the policy lacks a secular purpose. *See* Appellant's Br. 16 n. 11.

Nevertheless, Comer argues that the district court erroneously concluded that TEA's connection to the classroom is too "attenuated" to implicate *Aguillard*. *See* Appellant's Br. 27-29, 35-36. But TEA's subordinate, administrative role in the curriculum development process is established by statute, and is undisputed. *Supra* pp. 6-9. And even if Comer could show that she had some role in determining or affecting

what is taught in Texas classrooms (which she cannot), the record is undisputed that the state science curriculum and TEKS call for the teaching of evolution, without limitation or disclaimer. There is no evidence remotely suggesting that TEA's employment policy subverts that requirement in any way.

At best, Comer speculates about effects the TEA neutrality policy *might* someday have on the advice given to schoolteachers throughout the State—and the effect that advice *might* in turn have on students across Texas. But such rank speculation cannot support her facial challenge to the policy—and that is particularly so given that the Board has maintained its longstanding position requiring the teaching of evolution, without teaching creationism. *Cf. Croft*, 562 F.3d at 750 ("All of these speculative possibilities may be fertile ground for as-applied challenges to the statute if they occur. But we should not engage in such speculation on a facial review of the law.").

C. The District Court Committed No Doctrinal Errors In Upholding the TEA Employment Policy and Affirming Comer's Termination.

In conducting its Establishment Clause analysis, the district court assessed TEA's policy under the traditional "*Lemon* test," holding that Comer could not prove that the "primary effect" of the policy is the advancement of religion. RE.2, at 18. Comer never even attempted to show that the policy lacks a secular purpose or causes

excessive entanglement between government and religion, per the other prongs of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

"*Lemon's* second prong asks whether, irrespective of the [state's] actual purpose, 'the practice under review in fact conveys a message of endorsement'" of religion. *Freiler*, 185 F.3d at 346 (citation omitted). This criterion requires the court to "gauge the objective meaning" of the challenged governmental policy from the standpoint of a hypothetical "reasonable" observer. *Briggs v. Mississippi*, 331 F.3d 499, 507 (5th Cir. 2003) (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (O'Connor, J., concurring)). It is not concerned with "whether there is *any person* who could find an endorsement of religion, whether *some people* may be offended by the [policy], or whether some reasonable person *might* think the State endorses religion." *Id.* (citation omitted) (emphasis supplied).

Under this standard, the district court properly held that no "reasonable observer" could believe that TEA endorses religion through its neutral employment policy:

> A reasonable observer would be aware of the neutrality policy's context, including *the relationship between the Agency and the Board* and understand that the policy applies *beyond the creationism-evolution debate*. In such a context, a reasonable observer would not believe that the policy advances or endorses creationism or its associated religion.

RE.2, at 17 (emphasis supplied). Comer's disagreement with this analysis is based entirely upon her mistaken assertion that TEA's employment policy equates creationism with evolution as a curricular matter. Appellant's Br. 20-22, 30-33, 37-38.

Finally, Comer mischaracterizes a single phrase from the summary judgment order in hopes of salvaging her claim that the TEA neutrality policy, as applied here to justify her termination, violated the Establishment Clause. The court noted that, "[g]iven the reasons for the Agency's neutrality policy, Agency staff must remain neutral on disputed curriculum issues *regardless of a particular position's merit or constitutionality*." RE.2, at 16 (emphasis added). Comer argues that this "breathtaking" assertion "independently warrants reversal." Appellant's Br. 25. But as context makes clear, the district court was not "approving" or "licensing" the State to fire employees for unconstitutional reasons (*see* Appellant's Br. 23, 25-26), nor was it condoning any policy "promoting creationism or deriding evolution in the classroom," *id.* at 24. The court was only noting that the neutrality policy requires TEA employees to remain silent and protect the Board's decisional process, "regardless" of whatever decisions may result from that process. Whether or not the Board's eventual decision itself violates the Constitution is, of course, an entirely separate matter.

* * *

This case is not about the constitutionality of any particular curriculum policy—indeed, it is not about a curriculum policy of any kind. It is about an internal employment policy—and about the need of policymakers for staff they can rely on to conduct their jobs in a neutral fashion. Comer was not asked to do anything unconstitutional. She was simply asked to avoid publicly expressing opinions on potential Board policies on behalf of TEA, in order to protect the integrity of the Board's decisional process. It was unfortunate that she was unable to do so—and even more unfortunate that she now attempts to transform her dispute with her employer into a federal constitutional case. But the Establishment Clause does not remotely forbid government officials from taking steps to ensure a neutral and efficient decisionmaking process.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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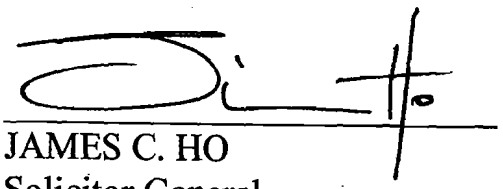

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The undersigned counsel of record does hereby certify that two true and correct copies of the Appellees' Brief, along with a computer readable disk copy of the brief, were served via UPS Overnight Next Day Delivery, on October 15, 2009 to:

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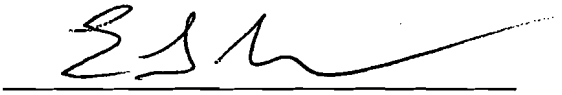

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